REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / (NO)
(2) OF INTEREST TO OTHER JUDGES: YES / (NO)
(3) REVISED

03/12/2014
DATE

SIGNATURE

3/12/14

CASE NUMBER: 52830/2012

NTOKOZA SIBUSISO GUMEDE **PLAINTIFF**

and

MINISTER OF SAFETY AND SECURITY **DEFENDANT**

JUDGMENT

DOSIO AJ:

[1] This is an action whereby the Plaintiff claims damages from the Minister of Safety and Security ("the Defendant"), as a result of allegedly being shot by the police on the 13th of April 2012.

[2] The Defendant disputes the claim and alleges that the injury to the ankle was as a result of a motor vehicle accident injury and not a gunshot wound.

[3] The question of merits and quantum were not separated.

[4] The Plaintiff's case entailed calling the Plaintiff after which the Plaintiff's case was closed. Counsel for the Defendant brought an application in terms of rule 39 (6) of the uniform rules, for absolution from the instance.

BACKGROUND

[5] The Plaintiff avers that Warrant Officer Fredrich Van Zyl ("Van Zyl") unlawfully shot him, and that the Defendant is vicariously liable for the injuries and damages he sustained, because he was at all material times acting within the course and scope of his employment with the Defendant.

[6] The Plaintiff issued summons for payment of R 2 000 000-00 consisting of;
R 1 000 000-00 in respect of pain, suffering, shock and trauma; R 500 000-00 in respect of bodily disfigurement; and R 500 000-00 in respect of loss of amenities of life.

[7] The only witness that testified was the Plaintiff. He stated that on the 13th of April 2012 on his way to Piet Retief his vehicle broke down. During his endeavours to hitch-hike to Piet Retief he was offered a lift by a certain Mr Ndlovu who was driving a Sentra motor vehicle. The Plaintiff stated that it was his first and last time to see the driver of this car.

[8] On route to Piet Retief the driver turned onto a gravel road. The Plaintiff then saw police officers and several shots were fired. The motor vehicle rolled and the Plaintiff was ejected in the process. He stated he did not sustain any injuries from the accident.

[9] Whilst lying on the ground he noticed a white person pointing the barrel of a firearm towards him. This man then shot him on his left foot next to his ankle.

[10] After some time the paramedics arrived and took the Plaintiff to the Majuba hospital in Volksrust and a few days later he was taken to the Robs Ferreira hospital.

[11] On arrival the Plaintiff told the nurses he had been shot.

[12] The Plaintiff alleged he was blamed for the theft of this motor vehicle and he was later

found guilty of theft of a motor vehicle and sentenced to seven years imprisonment.

[13] As a result of the gunshot wound, the Plaintiff alleged that he suffered pain, emotional trauma, bodily disfigurement, shock and a fracture to his left ankle.

[14] The only evidence supporting a gunshot wound was the evidence of doctor Sithebe in the Plaintiff's bail application. Counsel for the Plaintiff requested to hand in the transcript but counsel for the Defence objected. The court provisionally allowed it to be handed in.

LEGAL PRINCIPLES

Absolution from the instance

[15] The learned De Villiers JP in the case of ***Gascoyne v Paul and Hunter*** **1917 TPD** 170 at page 173, stated that the test to be applied when an application for absolution from the instance is brought at the close of the plaintiff's case is whether;

"...there [is] *evidence upon which a reasonable man might find for the plaintiff?"*

[16] In the case of ***Mazibuko v Santam Insurance Co Ltd*** **1982 (3) SA 125 (A)** at page 133 the learned Corbett JA stated that;

"In an application for absolution made by the defendant at the close of the plaintiff's case ...a court...[decides]*... whether the plaintiff has made out a prima facie case."* [My emphasis].

[17] In the case of ***Gordon Lyod Page & Associates v Rivera & Another*** **2001 (1) SA 88 (SCA)** at p. 92 par [2] the court stated;

"The test for the absolution to be applied by a trial court at the end of the plaintiff's case was formulated in ***Claude Neon Lights (SA) Ltd v Daniel*** **1976 (4) SA 403 (A)** *at 409G-H in these terms:*
'...(W)hen absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a

Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."

[18] It is trite that when absolution is sought, a plaintiff seeking to invoke reliance on inferences should show that the inference he seeks to rely on is the most readily apparent and acceptable from a number of possible inferences. (see ***AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A)** at 614H-615B.

[19] In ***Govan v Skidmore* 1952 (1) SA 732 (N)** at 734C-D, the learned Selke J held that the selected inference must:

"...by the balancing of probabilities be the more natural and plausible conclusion from among several conceivable ones..."

[20] Credibility is usually not considered at this stage of the proceedings unless the evidence is so vague, contradictory or improbable that no court could accept it.

Expert evidence

[21] In the case of ***Mkhize v Lourens* 2003 (3) SA 292 (T)** at page 299, the learned Webster J stated;

" The Rule 36 (9) (a) and (b) notice and summary of the evidence to be given by an expert at a trial have no evidential value...A party does not waive his right to object to evidence given by someone who is described as an expert if there are reasons for doing so. The failure to have [an expert's] *qualifications and alleged expert knowledge...*[before the court is]*...a fatal flaw. His evidence remains mere opinion evidence that is irrelevant."* [my emphasis].

[22] In the case of ***Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC)** the learned Davis J at page 299 stated that;

"...an expert comes to court to give the court the benefit of his or her expertise"

[23] In the case of ***Harrington NO v Transnet Ltd t/a Metrorail* 2010 (2) SA 479 (SCA) 479 (SCA)** the learned Heher JA at paragraph 57 stated;

"Expert evidence is only as sound as the factual evidence on which it is based. The less fixed (or more variable) the assumptions and the fewer hard facts available to the expert, the greater scope for alternative conclusions".

Hearsay evidence

[24] Section 3 of the law of Evidence Amendment Act 45 of 1988 ("Act 45 of 1988") states the following;

"3. (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) Each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) The person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) The court, having regard to –

(i) The nature of the proceedings;

(ii) The nature of the evidence

(iii) The purpose for which the evidence is tendered;

(iv) The probative value of the evidence;

(v) The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) Any prejudice to a party which the admission of such evidence might entail; and

(vii) Any factor which should in the opinion of the court be taken into account,

Is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in

terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection."

[25] The learned Watermeyer JA in the case of ***R V Miller and Another*** **1939 AD 106** at page 119 stated that;

"...Whether or not...[statements]*... are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (i.e., as evidence of the truth of what they assert), they are hearsay and are excluded because their truth depends upon the credit of the asserter which can only be tested by his appearance in the witness box."* [my emphasis]

[26] Section 34 of the Civil Proceedings Evidence Act 25 of 1965 ("Act 25 of 1965") provides for the exceptional reception of hearsay in addition to section 3 (1) (a), (b) and (c) Act 45 of 1988.

[27] The learned authors DT Zeffert and AP Paizes in *The South African Law of Evidence* [1] state at pages 418 that ;

"...Part VI [of Act 25 of 1965] *enables a court dealing with documentary evidence to receive hearsay and give the evidence such weight as the court may think it deserves..."* [My emphasis].

[28] Section 34 of Act 25 of 1965 states as follows;

"(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided –

(a) the person who made the statement either –

(i) had personal knowledge of the matters dealt with in the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of

[1] Second Edition, LexisNexis, Durban, 2007

a duty to record information supplied to him by a person who had or might have been supposed to have personal knowledge of those matters; and

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay of expense would otherwise be caused, admit such a statement as is referred to in sub-section (1) as evidence in those proceedings –

(a) notwithstanding that the person who made the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or the material part thereof proved to be a true copy."

[29] The learned authors DT Zeffert and AP Paizes state at page 419 that if a document fulfils the requirements of the provisions of section 34 it is admissible as a matter of law and there is no discretion vested in the judge to exclude it. Section 34 (2) gives the judge a discretionary power to admit documents which do not comply with certain of the conditions of section 34 (1).The learned authors state further that a judge cannot exclude a document merely because the judge has a poor view of its evidential value. Once it is admitted it is within the discretion of the judge whether he or she will afford the document little or no weight.

Quantum of damages

[30] In the case of ***Erasmus v Davis*** **1969 (2) SA 1 (A)** the learned Muller, AJA, (as he then was) stated at pages 19-20;

" It is for the plaintiff to establish not only that he has suffered damage but also the quantum thereof."

[31] In the case of ***Monumental Art Co v Kenston Pharmacy (Pty)*** **1976 (2) SA (CPD)** 111 the learned Rose Innes AJ, (as he then was) stated at page 118;

"...it is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis in evidence or, an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made. ***Mkwanazi v Van der Merwe and Another, 1970 (1) SA 609 (AD)*** *at p. 630. If there is no or an insufficient evidential basis upon which the loss can be assessed on the probabilities, then no assessment of damages can be made for lack of proof of the quantum of those damages.* ***Enslin v. Meyer, 1960 (4) SA 520 (T)*** *at pp 523 – 4;* ***Lazarus v. Rand Steam Laundries (1946) (Pty.) Ltd., 1952 (3) SA 49 (T)*** *at p. 51."*

[32] For the Plaintiff to succeed in his claim he must prove that harm was sustained to himself, and that the conduct on the part of the Defendant was wrongful. There must also be a causal connection between the conduct of the Defendant and the Plaintiff's harm. A claim must be based on physical pain, mental distress, shock, loss of life expectancy, loss of life amenities, inconvenience, discomfort, disability and/or disfigurement. In all these instances, the harm must be linked to some bodily injury suffered by the plaintiff.

EVALUATION

[33] The Plaintiff's evidence did not impress this court.

1. During cross-examination the Plaintiff could not explain why he did not open up a criminal case of attempted murder against warrant officer Van Zyl. He stated that he told his attorney, yet this court finds this explanation improbable because had that been the situation, his attorney would have assisted him to open up a case.
2. During cross-examination he was questioned why the progress report completed by doctor Clur on the 13th of April 2012 mentioned the Plaintiff had been run over by a car instead of mentioning a gunshot wound. The Plaintiff responded that the nurses got this information from the police. During his evidence he stated he told doctor Sithebe he had been shot and that he could not remember a doctor Clur at Majuba hospital. During cross-examination he contradicted himself and admitted that it was doctor Clur who had made the inscription on his progress report on the 13th of April 2012 at 19h00. He could not dispute what was written on the report.

3. Although the Plaintiff insisted he was treated by doctor Sithebe, he was unable to explain where doctor Sithebe was or who the doctor was that had informed him his foot needed to be amputated.
4. Although the Plaintiff admitted during cross-examination that x-rays were done, he could not explain why the x-ray results were not in court.

[34] This court accepts that it was doctor Clur who treated the Plaintiff at the Majuba hospital and not doctor Sithebe. Doctor Clur's name is reflected on each page of the progress report commencing on the 13th of April 2012 until the 25th of April 2012.

[35] Doctor Esema took over from doctor Clur on the 16th of May 2012 until the 13th of June 2012.

[36] The progress report comprises twenty four pages. Nowhere was it reflected by either doctor Clur or doctor Esema that the Plaintiff was treated for a gunshot wound. The treatment was for a fracture of the left foot.

[37] This court notes that in the warning statement of the Plaintiff, which was compiled two days after the alleged shooting, the Plaintiff failed to mention he had been shot, instead he stated he would make his statement before a court of law.

[38] There is no corroboratory evidence for the Plaintiff's claim that he was shot.

[39] In the bail application transcript, although doctor Sithebe testified he had treated the Plaintiff for a gunshot wound, he did not explain if he himself saw this gunshot wound or if he was told about it. Doctor Sithebe was not cross-examined before this court. Although the Plaintiff filed a notice in terms of rule 39 (9) (a) indicating that he would be calling doctor Sithebe, he elected to close his case without calling him. The failure to call doctor Sithebe and the absence of x-ray results was fatal. There is nothing to corroborate what doctor Sithebe said in the bail application. Although section 34 (2) of Act 25 of 1965 allows the bail transcript to be handed in, this court has attached little weight to it.

[40] The report of the orthopaedic surgeon doctor Mgele is inconclusive. No pronouncements could be made in respect to a gunshot wound. Doctor Mgele did not

view any pre-operative x-rays or any other x-rays prior to the 3/7/2012. He also found no evidence of shrapnel in the soft tissues. The failure to call doctor Mgele also deprived this court of the ability to reach a conclusive finding that there was in fact a gunshot wound.

[41] In the discovered hospital documents no mention is made of a gunshot wound. Reference is only made to a motor vehicle accident causing a fractured left ankle and neck injury.

[42] The photos that were handed in showed an injury to the Plaintiff's foot, however, they showed the side of the Plaintiff's foot. There were no pictures showing a clear bullet entrance and exit wound.

[43] In the absence of an expert witness explaining the presence of a gunshot wound, this court is unable to make any findings in this regard.

[44] It is my considered view and finding that the Plaintiff's description of being shot is convoluted and confusing.

[45] Although credibility issues should not be considered at this stage of the proceedings, the Plaintiff's evidence is so vague that this court has considered it.

[46] The Plaintiff has failed to prove that the harm he sustained was as a result of the wrongful conduct of the Defendant.

[47] From the totality of the Plaintiff's evidence, it is my considered view and finding that the probabilities and inferences favour the view that he sustained his injury as result of a car accident, and not as a result of being shot. Had the Plaintiff been shot, the doctors at the Majuna hospital would have noted this injury.

[48] Even if the court is wrong in this regard, the Plaintiff failed to lead evidence in respect to quantum.

[49] The Plaintiff testified that he was using crutches and that he was waiting for the doctors to amputate his foot. No expert evidence was led as to why his foot needed to be amputated. The report of doctor Mgele states that the *"examination revealed a good*

general condition...Systematic examination revealed no abnormality", which is contrary to the version of the Plaintiff.

[50] Although doctor Mgele's report stated that the Plaintiff's future earning capacity had been affected adversely by the injuries sustained to his left foot and ankle, there is no factual evidence upon which this court can reasonably assess and compute the damages claimed by the Plaintiff. This court cannot make an arbitrary award.

[51] The claim for damages was based in respect to pain and suffering, shock and trauma, bodily disfigurement and loss of amenities of life. In the particulars of claim there was no claim for past or future medical expenses. There was no mention of quantum in the Plaintiff's heads of argument.

[52] Quantum is an essential element of the Defendant's claim.

[53] In the absence of quantum being proven, there is no *prima facie* evidence against the Defendant. Accordingly the Defendant is entitled to be absolved from the instance as there is no prospect that the Plaintiff's claim might succeed.

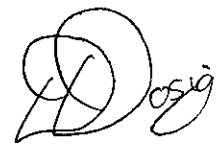
COSTS

[54] A defendant who is absolved from the instance should be regarded as being the successful party, and the plaintiff should be ordered to pay the defendant's costs unless there are good reasons for ordering otherwise. In this instance the Plaintiff is incarcerated and has little, if no means to pay costs. Accordingly I am of the view that this court should not grant a cost order against the Plaintiff.

ORDER

[55] In the premises the following order is made:

1. Absolution is granted
2. No order as to costs.



D DOSIO
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiff:	**Adv F. BALOYI**
Instructed by:	Mjali & Zimena Attorneys Office 3 Die Meent Building 53 Adelaide Tambo Street Volksrust
On behalf of the Defendant:	**Adv L.A PRETORIUS**
Instructed by:	The State Attorney Pretoria 255 Frances Baard Street Pretoria